

No. 07-40058

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE VOLKSWAGEN AG AND VOLKSWAGEN OF AMERICA, INC.,
Petitioners.

Original Proceeding from the United States District Court for the
Eastern District of Texas, Marshall Division

**BRIEF FOR AMICUS CURIAE
AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION
IN SUPPORT OF PETITIONERS**

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.:

1. American Intellectual Property Law Association (“AIPLA”)
Amicus Curiae
2. Peter A. Sullivan, Gabrielle S. Marshall, Gabrielle K. Genauer, Kamanta Kettle, Hughes Hubbard & Reed LLP, attorneys for Amicus Curiae, AIPLA.
3. Volkswagon AG and Volkswagen of America, Inc. n/k/a Volkswagen Group of American, Inc., Petitioners.
4. Danny S. Ashby, Robert H. Mow, Jr., Christopher D. Kratovil, Casey P. Kaplan, Kirkpatrick & Lockhart Preston Gates Ellis LLP, attorneys for Petitioners.
5. Burgain G. Hayes, attorney for Petitioners.
6. Richard Singleton, Ruth Singleton, Amy Singleton, and the Estate of Mariana Singleton, Respondents
7. Martin J. Siegel, attorney for Respondents.
8. Michael C. Smith, attorney for Respondents.
9. Jeffrey T. Embry, Jack Strother, Hossley Embry, L.L/P., and Thomas A. Crosley, The Crosley Law Firm, P.C., attorneys for Respondents.
10. Colin R. Little, Third Party Defendant.
11. J. Chad Parker and W. Todd Parker, The Parker Law Firm, P.C., attorneys for Third Party Defendant.

The undersigned counsel of record further certifies that no other non-governmental parties have an interest in the above-captioned case.

Dated: March 25, 2008
New York, New York

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STATEMENT OF INTEREST OF AMICUS CURIAE

The American Intellectual Property Law Association (AIPLA) is a voluntary bar association of over 17,000 members. Its members include attorneys in private and corporate practice, government officials and members of academia, all of whom share an interest in the legal issues affecting intellectual property. AIPLA educates its members on the legal and business issues underlying the development, commercialization and exploitation of intellectual property.¹

As part of its central mission, AIPLA advocates best practices in the law applicable to intellectual property cases. Thus, AIPLA has a vital interest in the just application of the transfer statute at issue in this case, 28 U.S.C. § 1404(a), and especially its application in the Fifth Circuit. This anomaly stems from the widespread belief that the Eastern District of Texas is a plaintiff-friendly venue that provides a substantial litigation advantage to a patent holder – but without much risk that such cases will be transferred even if a more logical venue exists.²

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1. Pursuant to Fed. R. App. P. 29(a), the parties have consented to the filing of this brief.
 2. There has been much written on the controversy surrounding the Eastern District of Texas patent docket. *See, e.g.,* Julie Creswell, *So Small a Town, So Many Patents*, N.Y. TIMES, Sept. 24, 2006, at Sec. 3 (stating that Marshall, Texas “may not be able to sustain its current pace of growth” and noting a “legislative movement” to pass a bill to “limit damages in patent lawsuits and another to require a more substantial connection between a business and the court where it brings a patent lawsuit”); Nate Raymond, *Taming Texas*, THE AMERICAN LAWYER, Mar. 1, 2008 at 102 (“A bill already passed by the House of Representatives and now before the Senate . . . is intended to dry up the patent wellspring in East Texas.”).

As a consequence, more patent cases were filed in the Eastern District of Texas in 2007 than in any other district.³

The routine filing of patent infringement complaints in the Eastern District of Texas that have essentially no connection to that district has been encouraged by the seeming reluctance of courts in that district to transfer cases under § 1404(a). Courts are supposed to transfer cases “[f]or the convenience of parties and witnesses” and “in the interest of justice.” 28 U.S.C. § 1404(a). The Eastern District of Texas, however, too often holds on to cases that should be transferred under that standard. A typical example is *Aerielle, Inc. v. Monster Cable Prods., Inc.*, No. 2:06-CV-0382, 2007 WL 951639 (E.D. Tex. Mar. 26, 2007). In *Aerielle*, the court refused to transfer the case to the Northern District of California even though virtually everything about the case was centered in that district, including the presence of both parties to the suit. *Id.* at *2-3.

Because this case involves the reconsideration of certain aspects of the transfer analysis in this Circuit, AIPLA respectfully submits this brief to advise this Court that such rules affect a large number of intellectual property cases, and to

3. Over the last seven years, the Eastern District of Texas has seen a meteoric rise in the number of patent cases filed within the district. In 2000, 23 patent cases were filed, but by 2007, the number increased to 368 – this is more patent filings than in any other district for 2007, including the Central and Northern Districts of California. See Andrew DiNovo & Michael Smith, *The New Spindletop – the Patent Litigation Boom in the Eastern District of Texas* (Intellectual Prop. Law Section, State Bar of Tex.), Winter 2006, at 5, available at http://www.texasbariplaw.org/newsletters/newsletter_winter2006.pdf; Justia.com, FEDERAL DISTRICT COURT FILINGS AND DOCKETS, <http://dockets.justia.com>. (In 2007, 308 patent cases were filed in the Central District of California and 148 were filed in the Northern District).

suggest ways in which the law can be clarified to address major problems in how the system is currently functioning. It is also worth noting that legislation on patent reform currently before Congress seeks to narrow drastically venue in patent cases, driven to a great extent by a desire to address the kind of forum shopping that occurs in the Eastern District of Texas.⁴ Providing the district courts clear guidance on applying the transfer provision will go a long way toward solving the forum shopping problem that is the impetus behind the pending venue legislation.

The district courts would benefit greatly from receiving additional guidance on applying the transfer statute. Even in the wake of the panel decision in the case, *In Re Volkswagen of Am., Inc.*, 506 F.3d 376 (5th Cir. 2007), *reh'g en banc granted by* No. 07-40058, 2008 WL 400236 (Feb. 14, 2008) (*Volkswagen II*), a district court distinguished the decision on the basis that it was a products liability case and found that the private interest factors counseled *against* transfer despite the fact that Texas had effectively no connection with the case. *LG Elecs., Inc. v. Hitachi, Ltd.*, No. 9:07-CV-138, 2007 WL 4411035, at *3-5 (E.D. Tex. Dec. 3, 2007).⁵ If a district court can distinguish *Volkswagen II* so easily, it is

4. See Patent Reform Act of 2007, S. 1145, 110th Cong. § 8 (2007), H.R. 1908, 110th Cong. § 11 (2007); see generally John R. Thomas & Wendy H. Schacht, CRS REPORT FOR CONGRESS, PATENT REFORM IN THE 110TH CONGRESS, INNOVATION ISSUES at 36-37 (2008).

5. The *LG* court ultimately agreed to transfer the *LG* case *only* because of closely related litigation involving the same patents in the transferee court. *Id.* at *4.

an indication that a stronger, clearer message is needed on applying the transfer statute not just for product liability cases, but for all cases in this Circuit.

ARGUMENT

There are four primary areas in which the courts of the Eastern District of Texas have consistently misapplied the transfer statute: 1) giving undue deference to the plaintiff's forum choice; 2) failing to give proper weight to the convenience of the parties and witnesses; 3) requiring an unrealistically high degree of specificity to prove that a more convenient forum exists; and 4) overstating the Eastern District's public interest in keeping a case in an inconvenient forum.

First, the courts should treat plaintiff's forum choice as the presumptive starting point for the venue analysis, but should not give substantive weight to that decision itself. Thus, if there is good cause to transfer the case for convenience and/or the interest of justice, the plaintiff's choice of forum should not interfere with the transfer. Second, when analyzing the private interest factors, the convenience of the venue for the parties and the witnesses should normally dictate which forum hears the case. If the balance of convenience favors an alternative forum, good cause would be shown and the case should be transferred (absent a legitimate, overriding public interest). Third, courts should not require highly detailed proof where such detail normally is not available at the outset of a case

(when transfer motions typically are filed). Finally, the courts should not use a generalized public interest to keep a case in an inconvenient forum.

I. PLAINTIFF'S FORUM CHOICE SHOULD BE TREATED ONLY AS A PRESUMPTIVE STARTING POINT WITHOUT SUBSTANTIVE WEIGHT.

In the § 1404(a) transfer analysis, the plaintiff's choice of forum will not be disturbed absent good cause showing that the case should be transferred. The burden of proving good cause remains with the party seeking to transfer the case. Beyond that, § 1404(a) does *not* provide that any substantive weight should be accorded to a plaintiff's forum choice. This is clear from its text: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a).

Section 1404(a) is a "federal housekeeping measure,' allowing easy change of venue within a unified federal system." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981) (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 613 (1964)). Congress intended that the statute be applied liberally to allow for easier movement within the federal court system than was available under the more stringent *forum non conveniens* doctrine that the statute was enacted to supplant. *See* 28 U.S.C § 1404 Revision Notes and Legislative Reports. When Congress removed the dismissal remedy under the *forum non conveniens* doctrine in

enacting §1404(a), it eliminated the “harshest part of the doctrine[,]” allowing for a more liberal transfer. *Norwood v. Kirkpatrick*, 349 U.S. 29, 31-32 (1955); *see Vebe-Chemie A.G. v. M/V Getafix*, 711 F.2d 1243, 1247 (5th Cir. 1983) (“The heavy burden traditionally imposed upon defendants by the *forum non conveniens* doctrine – dismissal permitted only in favor of a substantially more convenient alternative – was dropped in the § 1404(a) context.”).

The statute is unambiguous in creating an approach that balances the convenience of the parties and witnesses and the interest of justice, using the plaintiff’s forum choice as the presumptive starting point. The transfer analysis involves weighing a number of private interests to determine “the convenience of the parties and witnesses” and a number of public interests to determine the “interest of justice.” § 1404(a). The statute clearly does not provide substantive weight to plaintiff’s forum choice, although that is the presumptive forum absent a showing of good cause.⁶ Section 1404(a) should be interpreted that way: “A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.” *Perrin v. United States*, 444 U.S. 37, 42 (1979).

6. If the plaintiff has selected a forum that may be convenient for the parties and witnesses because the plaintiff is located there, the plaintiff’s location in the forum is independently significant to the transfer analysis in the balancing of the convenience factors. It confuses the analysis, however, to conflate that convenience consideration with the setting of the burden required to overcome the plaintiff’s choice of forum. That burden simply requires a showing of good cause for convenience and in the interests of justice. The plaintiff’s choice of forum itself lends no evidentiary weight to that analysis.

Despite the clear language of the statute, there has been uneven treatment of the level of deference given to plaintiff's forum choice under § 1404(a), due in part to the historical development of the transfer statute. Congress enacted § 1404(a) to address the difficulty with which transfer was accomplished under the *forum non conveniens* doctrine. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), is an example of how cases were transferred – more precisely, how they were dismissed and refiled – prior to the enactment of § 1404(a) under *forum non conveniens*. The Court in *Gulf Oil* noted that *forum non conveniens* was to be used “in rare cases” and the burden was consequently high. *Id.* at 509. The Court in fact saw the need for more liberal transfer and lamented the fact that many states had transfer statutes “investing courts with a discretion to change the place of trial on various grounds, such as the convenience of witnesses and the ends of justice,” but that “[t]he federal law contains no such express criteria to guide the district court in exercising its power.” *Id.* at 507.

Gulf Oil, thus, applied a burden of proof for transfers within the federal court system that Congress lessened in enacting § 1404(a).⁷ While some circuit courts recognized that the transfer statute imposed a lesser burden, others simply applied the prior analysis to the new statute. *Compare Veba-Chemie*, 711

7. It is important to note that the *Gulf Oil* public and private interest factors form part of the § 1404(a) analysis. *See Volkswagen II*, 506 F.3d at 386 n.6. It is the manner in which the factors are weighed – for example, the initial deference given to plaintiff's forum choice – where § 1404(a) differs from prior law under *forum non conveniens*.

F.2d at 1247 (noting that “dismissal permitted only in favor of a substantially more convenient alternative – was dropped in the § 1404(a) context.”), with *Ford Motor Co. v. Ryan*, 182 F.2d 329, 330 (2d Cir. 1950) (“Congress did not alter the standard theretofore embodied in the doctrine of *forum non conveniens*.”). This has led to uneven treatment of the transfer statute among the circuits.⁸

The better-reasoned cases apply a lesser burden in the transfer analysis. For example, in *Pacific Car*, the court found that plaintiff’s forum choice was entitled only to “minimal consideration” where the operative facts did not occur in the forum, and the forum otherwise had no “particular interest in the parties or the subject matter.” 403 F.2d at 954. The *Pacific Car* court stated: “We are left, then, with a choice of forum supported only by the fact that it was chosen. Such a choice cannot prevail under § 1404(a) against the showing of

8. In some cases, courts have conflated the burden to allow transfer with the initial presumptive weight given to plaintiff’s forum choice. This has led to an approach that employs nebulous sliding scales of deference depending on the particular facts presented. For example, the Second, Third and Fourth Circuits discuss the standard in terms of giving some amount of substantive weight to the plaintiff’s choice of forum. See *Ford Motor Co.*, 182 F.2d at 330 (plaintiff’s forum choice “should rarely be disturbed”) (citation omitted); *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3d Cir. 1970) (plaintiff’s forum choice “should not be lightly disturbed”) (citation omitted); *Collins v. Straight*, 748 F.2d 916, 921 (4th Cir. 1984) (plaintiff’s forum choice “should rarely be disturbed.”) On the other hand, the Seventh and Ninth Circuits have afforded less deference in some instances. See *F.D.I.C. v. Citizens Bank & Trust Co.*, 592 F.2d 364, 368 (7th Cir. 1979); *Pacific Car & Foundry Co. v. Pence*, 403 F.2d 949, 954 (9th Cir. 1968). This Court noted the “legal minefield” created by similar cases in the Fifth Circuit with respect to the reflexive application of *forum non conveniens* deference to the transfer statute. *Volkswagen II*, 506 F.3d at 383.

inconvenience here made by the petitioner.” *Id.* at 955 (citing *Chi., Rock Island & Pac. R.R. v. Igoe*, 220 F.2d 299 (7th Cir.), *cert. denied* 350 U.S. 822 (1955)).⁹

This Court has already recognized that plaintiff’s choice of forum “is neither conclusive nor determinative.” *In Re Horseshoe Entm’t*, 337 F.3d 429, 434 (5th Cir.), *cert. denied* 540 U.S. 1049 (2003) (holding that district court “erred in attributing decisive weight to the plaintiff’s choice of forum”). District courts in the Eastern District of Texas, however, continue to weigh plaintiff’s choice of forum inconsistently, and often improperly give that choice substantive and decisive weight.¹⁰

FCI USA, Inc. v Tyco Elec. Corp., No. 2:06-CV-4, 2006 WL 2062426 (E.D. Tex. July 24, 2006), clearly illustrates the problem of affording undue weight

9. There is a dearth of appellate jurisprudence on transfer in patent cases since the broadening of the venue statute. Those few decisions, however, are from the Federal Circuit applying regional circuit law, and they offer little guidance on the weight to be accorded certain factors in the analysis of § 1404(a). *See, e.g., Storage Tech. Corp. v. Cisco Sys., Inc.*, 329 F.3d 823, 836 (Fed. Cir. 2003) (applying 7th Circuit law) (affirming without discussing the level of deference to plaintiff’s initial forum choice); *HollyAnne v. TFT, Inc.*, 199 F.3d 1304, 1307 n.2 (Fed. Cir. 1999) (applying 8th Circuit law) (discussing, but not deciding, transfer); *Regents of the Univ. of Cal. v. Eli Lilly & Co.*, 119 F.3d 1559, 1565 (Fed. Cir. 1997) (applying 9th Circuit law) (affirming transfer back to MDL court for trial). In one recent case, however, the court noted that district courts must consider the “convenience factors” in the § 1404(a) transfer analysis in determining the more appropriate venue when a declaratory judgment action is filed before an actual or imminent infringement action. *See Micron Tech., Inc. v. Mosaid Techs., Inc.*, No. 2007-1080, 2008 WL 540182, at *4, 6-7 (Fed. Cir. Feb. 29, 2008).

10. *See, e.g., Datamize, Inc. v. Fidelity Brokerage Servs., LLC*, No. 2:03-CV-321, 2004 WL 1683171, at *8 (E.D. Tex. Apr. 22, 2004) (Plaintiff’s choice “usually highly esteemed”); *Cummins-Allison Corp. v. Glory, Ltd.*, No. 2:03-CV-358, 2004 WL 1635534, at *5 (E.D. Tex. May 26, 2004) (Plaintiff’s choice “entitled to substantial deference”); *Source, Inc. v. Rewards Network, Inc.*, No. 2:04-CV-347, 2005 WL 2367562, at *1 (E.D. Tex. Sept. 27, 2005) (Plaintiff’s choice entitled to “strong presumption”).

to plaintiff's forum choice. In that case, the district court denied transfer, even though both plaintiff and defendant were located in the alternative forum, and the only factor that supported retaining the case was the (non-resident) plaintiff's forum choice. *Id.* at *2-4. *FCI* vividly illustrates the overwhelming weight that the Eastern District of Texas places on the plaintiff's choice of forum. Because this analytical framework is routinely applied in patent cases, *see, e.g., Aerielle*, 2007 WL 951639, at *2-3, there are very few patent cases transferred out of the Eastern District despite the clear language of the transfer statute and the policy of liberal transfer embodied in it.

Allowing cases such as *FCI*, *Aerielle* or this case to remain in the Eastern District of Texas is contrary to the very purpose of § 1404(a). On the other hand, there is no federal policy in favor of forum shopping that should frustrate the stated federal policy, embodied in § 1404(a), of hearing cases in convenient forums. Other district courts have recognized this and have afforded little or no deference to plaintiff's forum choice where the plaintiff does not reside in the chosen forum. *See Finmeccanica S.p.A. v. General Motors Corp.*, No. 1:07 cv 794, 2007 WL 4143074, at *3 (E.D. Va. Nov. 19, 2007) (“[W]here neither the plaintiff nor the defendant resides and where few or none of the events giving rise to the cause of action accrued, ‘that plaintiff’s choice loses its place status in the court’s consideration.’” (citations omitted)); *Munoz v. England*, No. 05-2472, 2006

WL 3361509, at *8 (D.D.C. Nov. 20, 2006) (finding plaintiff's choice of forum was entitled to less than ordinary deference where he did not reside in the forum state and the action bore no "meaningful ties" to the forum); *Stuyvesant v. United States*, No. 05-5254, 2007 WL 1931292, at *3 (D.N.J. June 29, 2007) (giving less deference to plaintiff's choice of venue where plaintiff did not directly oppose transfer motion and plaintiff did not reside in his chosen venue at the time of trial); *cf. Piper Aircraft*, 454 U.S. at 255-56 (holding that a foreign plaintiff's forum choice is entitled to little weight).

The lesson to be drawn from the statute and these cases is that the plaintiff's forum choice is a presumptive starting point, but it is entitled to no substantive weight if the convenience of the parties and witnesses, or the interest of justice, points to another forum. This is not a situation where plaintiff has chosen the place of his residence (or, in a patent infringement case, the plaintiff-inventor has chosen his home forum).¹¹ In such an instance, some substantive deference should be provided to the plaintiff, and it will be provided as part of the balancing of convenience factors (discussed *infra* Section II). In this case, plaintiffs did not choose their home district, and none of the parties and the witnesses resides in the

11. The Association would not go so far as to suggest, however, that a patent holder who sets up a corporation in a forum merely to resist transfer should be entitled to any substantive deference for its forum choice. *See Gemini IP Tech., LLC v. Hewlett-Packard Co.*, No. 07-C-205, 2007 WL 2050983, at *1, 3 (W.D. Wis. 2007) (transferring a patent case brought in Wisconsin by a company incorporated in Wisconsin, noting that the corporation was merely a "made for litigation" entity with little true connection to the venue).

Eastern District of Texas. *See Volkswagen II*, 506 F.3d at 378-79. The facts giving rise to this suit did not occur in this district. *Id.* Plaintiffs did not choose this forum because it was more convenient than other venues, such as the Northern District of Texas, where convenience is clear and venue also would have been proper. The plaintiffs' forum choice thus deserves no substantive weight.

II. THE TRANSFER ANALYSIS SHOULD FOCUS ON THE PROXIMITY OF THE EVIDENCE AND WITNESSES TO THE FORUM.

Section 1404(a) requires the court to determine if the convenience of the parties and witnesses is best served in the chosen forum. This requires an understanding of the location of the witnesses and evidence that will be at issue in the case so that the most convenient forum can be identified.

Too often, however, the Eastern District of Texas discounts the convenience of the parties and witnesses in keeping cases in the District. For example, in *Aerielle*, the district court denied defendant's motion for change of venue even though plaintiff and defendant were both located in the alternative forum, which was over a thousand miles away from the Marshall courthouse. 2007 WL 951639 at *2.

In some instances, the courts in the Eastern District have discounted the convenience of witnesses because the parties could use video deposition testimony in lieu of live witness testimony. *See, e.g., LG Elecs.*, 2007 WL

4411035, at *5; *Symbol Techs., Inc. v. Metrologic Instruments, Inc.*, 450 F. Supp. 2d 676, 679 (E.D. Tex. 2006); *VCode Holdings, Inc. v. Cognex Corp.*, No. 2:07-CV-138, 2007 WL 2238054, at *3 (E.D. Tex. Aug. 3, 2007).¹² In other instances, these courts have discounted the parties' convenience versus that of non-parties even though the statute does not differentiate between them. *See, e.g., Aerielle*, 2007 WL 951639 at *2.

This Court in *In re Volkswagen (Volkswagen I)* warned against discounting the convenience of the parties and witnesses. *See* 371 F.3d 201, 205 (5th Cir. 2004). It instructed the Eastern District to consider the convenience of all witnesses, and noted that it was improper to conduct an analysis under § 1404(a) without doing so. *Id.*

A “center of evidentiary gravity” analysis is appropriate to determine the proximity of the witnesses and evidence to the proposed forum. Such an analysis should consider the witnesses and evidence of all parties and non-parties in a balanced fashion. In one recent patent case, *Arete Power, Inc. v. Beacon Power Corp.*, No. C07-5167, 2008 WL 508477, at *13 (N.D. Cal. Feb. 22, 2008),

12. This Circuit has acknowledged the importance of live witnesses to a proper presentation at trial. *See Perez & Compania (Cataluna), S.A. v. M/V Mexico I*, 826 F.2d 1449, 1453 (5th Cir. 1987) (“[T]o ‘fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition [] is to create a condition not satisfactory to court, jury or most litigants.’” (quoting *Gulf Oil*, 330 U.S. at 511)); *see BBC Chartering & Logistic GmbH & Co. K.G. v. Siemens Wind Power A/S*, No. H-06-1169, 2008 WL 155048, at *5-6 (S.D. Tex. Jan. 15, 2008) (dismissing the case for *forum non conveniens*, the court noted “[l]ive testimony in this forum is important” (citing *Perez & Compania*, 826 F.2d at 1453)).

the court employed this test and transferred the case because the “center of evidentiary gravity” was in the transferee court. *See also Coppola v. Ferrellgas Inc.*, No. 07-4023, 2008 WL 612676, at *3-6 (E.D. Pa. Mar. 6, 2008) (granting transfer based on the center of evidentiary gravity).

The district courts should undertake this “center of evidentiary gravity” analysis in weighing the private interest factors to determine the most appropriate forum to hear a case. As the Court noted in *Volkswagen I*, once the distance between the forums is more than 100 miles, “the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled.” 371 F.3d at 204-05. In this case, the center of evidentiary gravity is clearly in the Northern District of Texas, where all the witnesses and the site of the accident are located.

III. THE COURTS SHOULD NOT REQUIRE A HIGH LEVEL OF PROOF TO SUBSTANTIATE THE INCONVENIENCE OF THE FORUM.

The Eastern District of Texas sometimes asks for significant specificity in transfer motions, even though these motions typically are filed early in the case to avoid timeliness attacks. In *Aerielle*, the court required a detailed showing on the importance of the witnesses early in the case. 2007 WL 951639 at *2. In *Stevens v. General Motors Corp.*, the court denied the transfer motion even though the defendant provided two affidavits from “key” witnesses because the

“precise nature of their inconvenience . . . [was] unclear from the witnesses’ affidavits.” No. 6:06-CV-255, 2006 WL 3375381, at *3 (E.D. Tex. Nov. 21, 2006).¹³ In *Volkswagen II*, the district court likewise found insufficient information on whether certain witnesses were “key” witnesses, but the Panel found that Volkswagen nonetheless met its burden. 506 F.3d at 385-86.

The Supreme Court has frowned on requiring this level of specificity since such detailed knowledge is not available at the outset of a case. *Cf. Piper Aircraft*, 454 U.S. at 258 (“Requiring extensive investigation would defeat the purpose of their [*forum non conveniens*] motion.”). A heightened evidentiary burden frustrates the intent of the transfer statute to allow cases to be heard in the most convenient jurisdiction. The level of specificity should be commensurate with the stage of the proceedings.

IV. A GENERALIZED PUBLIC INTEREST IN THE DISPUTE SHOULD NOT PREVENT TRANSFERRING THE CASE TO THE MORE CONVENIENT FORUM.

Courts weigh public interest factors as well as the convenience factors under § 1404(a). Among the factors historically included is the respective forums’ interest in adjudicating the dispute. *Volkswagen I*, 371 F.3d at 203.

13. See also *Christensen v. General Motors Corp.*, No. 2-06-CV-145, 2006 WL 2065567, at *2 (E.D. Tex. July 24, 2006); *Candela Corp. v. Palomar Med. Techs., Inc.*, No. 9:06-CV-277, 2007 WL 738615, at *4 (E.D. Tex. Feb. 22, 2007); *Mershon v. Sling Media, Inc.*, No. 2:07-006, 2007 WL 2009185, at *2 (E.D. Tex. Jul. 5, 2007).

In the Eastern District of Texas, the local forum's asserted interest often is employed to justify keeping the case even if the dispute has no particular relationship to the District. For example, in *Mershon*, the court rejected a transfer motion even though neither party resided in the Eastern District of Texas and no significant relevant events occurred in the forum (other than nationwide sales of infringing goods). 2007 WL 2009185 at *3. It rejected the motion because “[t]he admitted sale of allegedly infringing products in the Eastern District is an event that is significant and relevant to this action.” *Id.*

In reality, the Eastern District had no more interest in adjudicating these particular disputes than any other district where sales occurred, and certainly less than a district where the parties, evidence and witnesses are located. Claiming a local interest in adjudicating a dispute of national interest distorts the intent behind the transfer statute. *See Volkswagen II*, 506 F.3d at 387 (“The district court’s provided rationales – that the citizens of Marshall have an interest in this product liability case because the product is available in Marshall, and that for this reason jury duty would be no burden – stretch logic in a manner that eviscerates the public interest that this factor attempts to capture.”); *cf. Piper Aircraft*, 454 U.S. at 260-261 (rejecting similar rationale in *forum non conveniens* case).

The public interest factor should seldom determine where a case should be tried on facts such as those involved in this case. Unless there is a

showing that the jurisdiction has a particularized interest in the adjudication of the suit, such as where the less convenient court has already dedicated considerable resources to the case, *see, e.g., Regents of the Univ. of Cal.*, 119 F.3d at 1565 (affirming under 9th Circuit law transfer back to MDL court for trial where that court was already familiar with the issues), the more convenient forum should hear the case. All district courts will have the same generalized interest in these issues, so the factor should be neutral in the analysis. A generalized interest in encouraging safe products or a robust respect for patent rights should not trump the convenience of the parties, and it should not be a reason to maintain this action in the Eastern District of Texas.

CONCLUSION

For the foregoing reasons, the petition for mandamus should be granted.

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CERTIFICATE OF SERVICE

I hereby certify that I am over the age of eighteen (18) years, not a party to this action, and that, on this 26th day of March, 2008, I caused 20 true and accurate paper copies of the BRIEF FOR AMICUS CURIAE AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION IN SUPPORT OF PETITIONERS and one copy in electronic format, to be served on the Clerk of the Court and I further certify that on the 26th day of March, 2008, two printed copies along with an electronic copy in Portable Document Format, were served by Federal Express mail upon the following:

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7) and Fifth Circuit Rule 32.3:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 4,764 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in 14 point (12 point in footnotes) Times New Roman font.

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